Public Prosecutor v Abdul Malik bin Abdullah

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42H-31–02 OF 2012
AKHTAR TAHIR J
23 OCTOBER 2012

Criminal Procedure — Judgment — Grounds of judgment — Whether appropriate for trial judge to admit that he was not absolutely sure he had passed correct sentence — Whether decision making process could be treated as learning process

Criminal Procedure — Sentencing — Appeal against sentence — Statutory rape — Whether trial judge failed to appreciate gravity of offence — Whether trial judge failed to apply sentencing principles — Whether sentence was inadequate — Whether trial judge was right in ordering the two sentences of imprisonment to run concurrently — Whether appellate interference necessary

It was the prosecution's case that the victim, a 15-year old girl had been enticed by the respondent, her yoga instructor, to have sex with him on more than one occasion. The respondent was charged with two counts of statutory rape. He pleaded guilty to the two charges and was sentenced to five years of imprisonment and one stroke of the rotan for the first charge and six years of imprisonment and two strokes of the rotan for the second charge, with both sentences to run concurrently. In determining the sentence to be handed down to the respondent, the trial judge took into consideration the fact that the respondent had pleaded guilty to the charge. This was the prosecution's appeal against the sentence. The prosecution submitted that the facts showed the respondent to have a sexually depraved mind with no hesitancy of applying it on young innocent girls and that such a person should not be easily released into society.

Held, allowing the appeal:

(1) In his grounds of judgment the trial judge had not considered the gravity of the offence committed as spelled out in the facts of the case, but had instead chosen to totally ignore the facts of the case. The trial judge had considered only one factor in sentencing the respondent in this case, and that was the plea of guilty of the respondent. By so doing the trial judge had failed to appreciate the sentencing principles and had not considered another factor of sentencing, namely that of public interest (see paras 9–12).

(2) The last paragraph of the trial judge's grounds of judgment also raised two issues of great concern. The first was that the trial judge after recognising that a more severe sentence was appropriate in this case chose to disregard this fact in favour of the plea bargaining between the prosecution and the defence. However, any agreement as to sentence should not fetter the discretion of the judge in imposing the appropriate sentence based on the circumstances of the case (see paras 13–15).

(3) The second issue was the uncertainty expressed by the trial judge when imposing the final sentence. However, the law did not allow for uncertainty and a judge should take full responsibility for the decisions he makes. The law certainly did not permit a judge to regard the decision making process as a learning process. As such, it was absolutely wrong for the trial judge to admit that he was not absolutely sure he had passed the correct sentence and that he had left it to the higher court to correct him (see paras 17–18).

(4) Further, it is a common principle that where the two or more offences committed by the accused were distinct offences the appropriate sentence should be consecutive rather than concurrent. Thus, after taking into account the age of the respondent and the fact that he had committed the offence twice at different dates he was sentenced to 10 years imprisonment for each charge with the sentence to run consecutively from the date of sentence in the sessions court. The strokes of the rotan were maintained as per the earlier sentence (see paras 19–20).

[Bahasa Malaysia summary

Adalah menjadi kes pihak pendakwaan bahawa mangsa, gadis berusia 15 tahun telah digoda oleh responden, guru yoganya, untuk melakukan hubungan seks melebihi daripada satu kali. Responden telah dituduh dengan dua kiraan rogol statutori. Dia telah mengaku bersalah terhadap kedua-dua tuduhan dan telah dihukum dengan hukuman penjara selama lima tahun dan satu sebatan rotan untuk tuduhan pertama dan enam tahun hukuman penjara dan dua kali sebatan rotan untuk tuduhan kedua, dengan kedua-dua hukum bermula serentak. Dalam menentukan hukuman yang harus diberikan kepada responden, hakim perbicaraan mengambil kira fakta bahawa responden telah mengaku bersalah untuk tuduhan-tuduhan tersebut. Ini merupakan rayuan pihak pendakwaan terhadap hukuman. Pihak pendakwaan berhujah bahawa fakta-fakta menunjukkan responden mempunyai minda yang tidak bermoral dan seksual serta tidak teragak-agak untuk menggunakannya ke atas gadis-gadis muda yang naif dan orang sedemikian tidak seharusnya dengan sewenang-wenang dibiarkan bebas dalam masyarakat.

Diputuskan, membenarkan rayuan:

(1) Dalam dasar-dasar penghakiman, hakim perbicaraan tidak mengambil

kira keseriusan kesalahan yang dilakukan seperti yang telah dinyatakan di dalam fakta kes, tetapi sebaliknya telah memilih untuk mengendahkan sepenuhnya fakta kes tersebut. Hakim perbicaraan juga hanya mempertimbangkan satu faktor di dalam hukuman responden di dalam kes ini, iaitu akuan bersalah responden. Dengan melakukan sedemikian hakim perbicaraan telah gagal untuk menghargai prinsip-prinsip menjatuhkan hukuman dan tidak mempertimbangkan lagi satu faktor menjatuhkan hukuman, iaitu kepentingan awam (lihat perenggan 9–12).

(2) Perenggan terakhir alasan penghakiman hakim perbicaraan juga membangkitkan dua isu yang amat dikhuatiri. Pertama adalah bahawa hakim perbicaraan selepas mengenal pasti bahawa hukuman yang lebih berat adalah lebih bersesuaian tetapi telah memilih untuk tidak mengendahkan fakta ini dan lebih berpihak kepada persetujuan akuan antara pihak pendakwaan dan pihak pembelaan. Walau bagaimanapun, apa-apa perjanjian berkenaan hukuman tidak seharusnya memberi kesan terhadap budi bicara hakim untuk mengenakan hukuman yang berpatutan berdasarkan keadaan kes tersebut (lihat perenggan 13–15).

(3) Isu kedua adalah ketidakpastian yang dinyatakan oleh hakim perbicaraan apabila mengenakan hukuman muktamad. Bagaimanapun, undang-undang tidak membenarkan ketidakpastian dan seorang hakim seharusnya mengambil tanggungjawab sepenuhnya bagi kesemua keputusan yang dibuat oleh beliau. Undang-undang sudah tentu tidak membenarkan seorang hakim untuk menganggap proses membuat keputusan sebagai proses pembelajaran. Oleh itu, adalah amat salah bagi hakim perbicaraan untuk mengakui bahawa beliau tidak pasti bahawa dia telah memberikan hukuman yang betul dan bahawa beliau telah membiarkan perkara tersebut untuk diperbetulkan oleh mahkamah atasan (lihat perenggan 17–18).

(4) Selanjutnya, adalah menjadi prinsip umum bahawa apabila dua atau lebih kesalahan yang telah dilakukan oleh tertuduh merupakan kesalahan yang berbeza hukuman yang berpatutan seharusnya bermula secara berturut-turut dan bukan secara serentak. Justeru, selepas mengambil kira usia responden dan fakta bahawa dia telah melakukan kesalahan tersebut sebanyak dua kali pada tarikh-tarikh yang berbeza dia telah dijatuhkan dengan hukuman penjara selama sepuluh tahun untuk setiap tuduhan dengan hukuman untuk berjalan secara berturut-turut dari tarikh hukuman di mahkamah sesyen. Jumlah sebatan rotan dikekalkan seperti di dalam hukuman yang terdahulu (lihat perenggan 19–20).]

Notes

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3702–3770.

For cases on grounds of judgment, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2453–2459.

Cases referred to

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534, CA (refd)
New Tuck Shen v PP [1982] 1 MLJ 27 (refd)
PP v Ahmad Osman [1997] MLJU 367; [1998] 1 CLJ 66, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mohamed Nor & Ors [1985] 2 MLJ 200b, SC (refd)
R v Ball (1951) 35 Cr App Rep 164, CA (refd)
R v Sargeant (1974) 60 Cr App Rep 74, CA (refd)
Teo Chin Hwa [2000] 1 MLJ 687; [2000] 1 CLJ 224, CA (refd)

Legislation referred to

Penal Code s 376

Norhani bt Mohamad Adzhar (Public Prosecutor, Attorney General's Chambers) for the appellant.
A Saravanan (Vanan & Co) for the opponent.

Akhtar Tahir J:

[1] The accused in this case faced two charges of statutory rape as follows:

> Pertuduhan Pertama:
>
> Bahawa kamu pada bulan Februari 2010, jam lebih kurang 0800 malam, di alamat No. 117, Jalan Dato' Harun, Kampung Dato' Harun, 48200 Serendah, di dalam daerah Hulu Selangor, di dalam negeri Selangor Darul Ehsan didapati kamu telah melakukan kesalahan rogol terhadap (1)(P)(I) Nama: Amala A/P Rama KPT: 950818-10-5810, yang pada masa itu adalah di bawah umur enam belas tahun. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 376 Kanun Keseksaan.
>
> Pertuduhan Kedua:
>
> Bahawa kamu pada bulan November 2010, jam lebih kurang antara 05.00 petang, di alamat No. 39D, Jalan Kolam Air, 44000 Kuala Kubu Bharu, di dalam daerah Hulu Selangor, di dalam negeri Selangor Darul Ehsan didapati kamu telah melakukan kesalahan rogol terhadap seorang perempuan India nama: Amala A/P Rama KPT: 950818-10-5810, yang pada masa itu adalah di bawah umur enam belas tahun. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 376 Kanun Keseksaan.

[2] The accused pleaded guilty to both the charges and was sentenced for the first charge to five years imprisonment and one stroke of the rotan and for the second charge six years imprisonment with two strokes of the rotan. Both the

A sentences of imprisonment were ordered to run concurrently. The prosecution being dissatisfied with the sentence imposed appealed against the sentence.

[3] It is an established principle of law that an appellate court will not disturb the sentence imposed upon by a lower court unless the lower court has erred by imposing a sentence which is manifestly lenient or manifestly excessive taking into account the facts of the case. See the cases of *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b; *Teo Chin Hwa* [2000] 1 MLJ 687; [2000] 1 CLJ 224.

[4] What then are the facts of the case? In this case the prosecution had tendered seven pages of type written facts this alone alludes to the seriousness of the offence. The facts as summarised shows that the victim a 15 years old girl was enrolled by her parents into a yoga class run by the accused.

[5] The victim was apparently under a depression as a result of a failed relationship with a boy. This provided an opportunity to the accused to come close to the victim on the pretext of counseling the victim. The counseling session took a sinister twist when the accused enticed the victim to have sex with him. The sexual liaisons happened more than once as detailed out in the facts for the purposes of the two charges.

[6] Apparently the victim was not the only person under the charge of the accused. The activity of the accused came into light when another girl attending the yoga class conducted by the accused was reported missing by her mother. As a result of police investigation the police found three other girls at the yoga center run by the accused.

[7] The police also found an assortment of sexual equipment in the cupboard belonging to the accused. The victim was sent for medical examination and a number of items were sent for chemist analysis. All the tests conducted confirmed that the victim did have sexual intercourse with the accused.

[8] The facts as tendered by the prosecution clearly showed the true character of the accused as a person having sexually depraved mind with no hesitancy of applying it on young innocent girls. Surely such a person should not be easily released into the society, as to do so would invite more calamity and danger especially to young girls.

[9] In his grounds of judgment the learned sessions court judge chose to totally ignore the facts of the case. Nowhere in his judgment had the learned judge considered the gravity of the offence committed as spelled out in the facts of the case.

[10] On the contrary the learned judge considered only one factor in sentencing the accused in this case that is the plea of guilt of the accused. Surely in sentencing this is not the only factor that a judge has to consider. There are countless cases which specify the factors a judge should take into consideration in sentencing. Nowhere it is more succinctly stated than in the case of *R v Sargeant* (1974) 60 Cr App Rep 74 by Lawton LJ as follows:

> Those classical principles are summed in four words, retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles to mind and to apply them to the facts of the case to see which of them has the greatest importance in the case which he is dealing.

[11] The Malaysian courts have also on numerous occasions elucidated the manner of a plea guilt is to be accepted as a mitigating factor. The judgment of Augustine Paul JCA (as His Lordship then was) in the case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534 is a stark reminder of how a plea of guilt is to be treated. His Lordship states as follows:

> The learned judge appears to have taken the view that credit should be given in every case where a person pleads guilty. The position in law is that it is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 1134; *Public Prosecutor v Sulaiman bin Ahmad* [1993] 1 MLJ 74; *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45). The discount that is given is normally a reduction of the sentence by about a third of what would otherwise have been imposed (see *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; *Public Prosecutor v Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116; *Christopher Khoo Ewe Cheng v Public Prosecutor* [1993] 3 MLJ 881). However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441;*Public Prosecutor v Leo Say & Ors* [1985] 2 CLJ 155). Its application in favour of an accused depends on the facts and circumstances of each case (see *Wong Kai Chuen Philip v Zaidon Shariff* [1991] 1 MLJ 321). Thus, as lucidly explained by Charles JA in *Leigh Nicholas Donnelly v R* (1997) 91 A Crim R 550 at p 554;
>
> > A court's attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which the court is to be concerned is what weight should be given to it in the circumstances.
>
> The circumstances in which a guilty plea will not have any weight are varied. The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Loh Hock Seng & Anor v Public Prosecutor* [1980] 2 MLJ 13; *Public Prosecutor v Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also given way (see *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537; *Public Prosecutor v Govindan a/l Chinden Nair* [1998] 2 MLJ 181).

[12] The above case highlights another factor of sentencing that of public

interest. Public interest is clearly defined in the celeberated case of *R v Ball* (1951) 35 Cr App Rep 164 in the judgement of Hilebry J as follows:

> In deciding the appropriate sentence a court should be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but with the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter a particular criminal from committing a crime again, or induce him to turn from criminal to an honest life. The public interest is best served, if the offender is induced to turn from criminal ways to honest living. Our law does not therefore, fix the sentence for a particular crime, but fixes a maximum sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

[13] Apart from the judge failing to appreciate the sentencing principles enunciated in the above cases a matter of great concern to me was the last paragraph of the grounds of judgment of the learned session judge which for purposes of clarity I am putting down in full:

> Adalah perlu dinyatakan bahawa sebelum hukuman dijatuhkan, timbalan pendakwa raya, Puan Syakimah Ibrahim dan peguambela OKT, En A Saravanan mencapai persetujuan dengan hukuman tersebut sekiranya OKT berhasrat untuk mengaku salah. Walaupun hukuman yang lebih berat wajar dikenakan tetapi oleh kerana hukuman telah dipersetujui pertimbangan hukuman juga adalah atas dasar tersebut. Sungguhpun demikian sekiranya saya melakukan kesilapan saya sedia untuk mendapat panduan.

[14] I viewed with disbelieve two matters that has come to fore from the above passage. The first is the learned judge although felt that a more severe sentence was appropriate in this case chose to disregard this fact in favour of the plea bargaining between the prosecution and the defence. Even more shocking is that in his final sentence the judge has shown uncertainty in his own imposed sentence and left it to the higher court to correct him.

[15] On the matter of plea bargaining it is clear that any agreement as to sentence does not fetter the discretion of the judge in imposing the appropriate sentence based on the circumstances of the case. The plea bargaining also certainly does not displace the principles of sentencing to be imposed in a particular case.

[16] The case of *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27 is on point where Wan Yahya J stated as follows:

Plea bargaining between the defence and the prosecution frequently takes place in our courts, but they are normally confined to the instances of the accused pleading guilty to lesser charges or to one of several charges in exchange for withdrawal of the rest. Be it noted here that the deputy public prosecutor is offering as his bargain something he is authorised by law to do, ie not to proceed with or amend charges. But imposing sentence, let alone reducing or enhancing it, is entirely not his within the contemplation of any law.

This court does not consider it bound by the private bargaining between the prosecution and the defence in respect of which bargaining it is not a party and in which it has been judicially prohibited to participate. The right to impose punishment on a guilty party is absolutely the discretion of the court. It will exercise that power judicially but will not tolerate any encroachment or even semblance of encroachment either by the prosecution or the defence in respect of such right. An agreement between the prosecution and the defence as to the nature of sentence to be imposed on the accused creates no obligation on the court and is good only for pricking the conscience of the defaulting party.

[17] On the second matter it is to be remembered that as a judge the paramount role is to make decisions based on law and evidence. A judge can make mistakes when deciding a case and the reason for having an appellate tier created in our judicial system is for the very purpose of correcting mistakes made by judges of a lower court. However the law does not allow for uncertainty. A judge must be absolutely sure of the decisions he makes and must take full responsibilities for such decision made. It is to address such uncertainties that principles like beyond reasonable doubth have evolved in our criminal justice system.

[18] The law certainly does not permit a judge to regard the decision making process as a learning process. The society has an expectation that each judge makes decisions based on the law and evidence and the society further expects the judge to be absolutely certain of his decision. I felt that it was absolutely wrong for the judge in this case to admit that he was not absolutely sure he had passed the correct sentence.

[19] Be that as it may, a final matter that needed determination in this case was whether the judge was right in ordering the two sentences of imprisonment to run concurrently. It is a common principle that where two or more offences committed by the accused are distinct offences the appropriate sentence should be consecutive rather than concurrent. However the totality principle as highlighted by Hishamudin Yunus J (as His Lordship then was) in the case of *Public Prosecutor v Ahmad Osman* [1997] MLJU 367; [1998] 1 CLJ 66 should also be considered. His Lordship said as follows:

A Tidak sesiapa yang dapat pertikaikan bahawa keempat-empat kesalahan yang telah dilakukan oleh responden dalam rayuan ini adalah kesalahan berlainan (*distinct offences*). Tidak satu pun dan kesalahan-kesalahan itu merupakan kesalahan subsidiary. Jika demikian, mengikut prinsip kesalahan berlainan (*distinct offences principle*), hukuman-hukuman itu hendaklah berjalan berasingan dan bukannya serentak. Ini telah pun diputuskan dengan jelasnya dalam kes *Public Prosecutor lwn Yap Huat Heng* [1985] 2 MLJ 414 di mana Yang Arif Hakim, Shaikh Daud H (beliau ketika itu) telah memutuskan (di ms 416):

B

Further on His Lordship said as follows:

C Mahkamah mengatasi dilemma ini dengan memakai satu lagi prinsip yang disebutkan sebagai prinsip keseluruhan (*totality principle*). Mengikut prinsip ini, jika dengan pemakaian prinsip kesalahan berlainan itu akan mengakibatkan keseluruhan tempoh penjara itu menjadi terlalu panjang, maka prinsip kesalahan berlainan itu hendaklah dipakai secara berpada-pada. Ini bermakna, jika tempoh penjara itu didapati terlalu panjang kesemua kesalahan yang berlainan itu akan

D diperintahkan berjalan serentak; atau separuh kesalahan sahaja yang akan diperintahkan berjalan berasingan, manakala kesalahan-kesalahan yang lainnya hendaklah berjalan serentak. Prinsip ini dijelaskan oleh Prof Dr Mimi Kamariah Majid dalam bukunya *Criminal Procedure in Malaysia* (1987, University of Malaya, ms 301) seperti berikut:

E

> The totality principle requires the Court to look at all the sentence imposed and decide whether in totality they are excessive. The Court has to consider an appropriate punishment for each offence and then look back to view them in totality. The Court should not impose lighter sentences for individual offences simply because should the Court order the punishment to run consecutively the

F totality appears reasonable.

[20] As a final determination of the sentence in this case and taking into account the age of the accused and that he had committed the offece twice at

G different dates I sentenced the accused to ten years imprisonment for each charge to run consecutively from the date of sentence in the sessions court. I maintained the one stroke of the rotan for the first charge and two strokes of the rotan for the second charge.

H *Appeal allowed.*

Reported by Kohila Nesan

I